

Claimant denied benefits for deliberate misconduct, even though coworkers had also stolen scrap metal from the employer without being disciplined. There was no evidence that the employer knew this was going on.



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Board of Review letterhead review Decision

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Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to award benefits to the claimant following his separation from employment on September 23, 2008. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

Benefits were granted after the review examiner determined that the employer had not met its burden to prove that the claimant had engaged in a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or deliberate misconduct in wilfull disregard of the employer's interest, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner to obtain additional evidence. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the subsequent consolidated findings.

The claimant was discharged on September 23, 2008. He filed a claim for unemployment benefits with the DUA but was disqualified in a determination issued by the agency on October 17, 2008. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, the review examiner overturned the agency's determination and granted the claimant benefits in a decision rendered on November 26, 2008. Both parties attended remand hearing.

The issue on appeal is whether the claimant, who was discharged, sold for his own benefit copper flashing that belonged to the employer, thereby engaging in deliberate misconduct in wilful disregard of the employer's interest.

Findings of Fact

The DUA review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety.

1. The claimant worked for the employer most recently from November 2007 until his discharge on September 23, 2008.
2. The claimant worked full time as a Driver for the employer's disposal and demolition company. The claimant reported to the employer's Owner.
3. The claimant was discharged for theft, after the claimant took and sold for his own profit copper from the employer's demolition site on September 23, 2008.
4. Employees at the employer's demolition sites are expected to bring refuse or scrap metals back to the employer's garage. Valuable metals such as aluminum or copper are saved by the employer to be sold as scrap.
5. On September 23, 2008, the claimant and another employee (the "Laborer") were scheduled to drive a load of materials, including reclaimed copper roof flashing, from the job site to the employer's garage.
6. On the trip back to the garage on September 23, the claimant stopped at a metal shop. The claimant took from the back of the company truck some copper scrap, which should have been brought to the employer's garage, and sold it to the metal shop.
7. When the Owner looked in the garage later on September 23, 2008, the copper flashing was not in the garage, and became concerned that it may have been stolen.
8. On September 23, 2008, the Laborer told the Owner that the claimant had stopped at a metal shop on the drive back to the garage, sold materials from the back of the truck, and gave \$30.00 to the Laborer from the sale proceeds.
9. On September 24, 2008, the Owner told the claimant that he no longer had a job, so long as the copper flashing was missing. The claimant told the Owner that multiple people, including the Owner's son, were stealing metal from the company.

10. Multiple employees have stolen valuable scrap metals from the employer's business, without being discharged.

11. On September 25, 2008, the claimant filed a claim for unemployment insurance benefits.

The credibility of the claimant's testimony was weakened by inconsistency. For example, the claimant testified at the original hearing that he stopped for two minutes at the metal shop at the request of the Laborer, where he waited in the truck and the Laborer checked the metal shop's hours. At the remand hearing, however, the claimant confirmed that he stopped at the metal shop at his own behest, that he got out of the truck and that he took materials out of the truck bin for the metal shop. Considering the above and the totality of the testimony, the credibility of the claimant's testimony is weakened and the claimant's testimony is not accepted regarding the 9/23/08 events.

As a result, it is accepted that the claimant stopped at a metal shop on the way back to the employer's garage on 9/23/08 to sell copper materials that should have been returned to the employer's garage as part of the employer's property.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence . . .

The legislative intent behind G.L. c. 151A, § 25(e)(2) is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." See Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). The consolidated findings show that the claimant sold the employer's copper scrap metal for his own profit, when he knew the employer expected him to

return it to the employer's garage, and that he did so without the employer's permission. The fact that other employees had also stolen from the employer without being discharged does not give him permission to do so or the right to collect unemployment benefits, and there is nothing in the record that suggests that the employer knowingly tolerated or condoned such thefts.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

The DUA review examiner's decision is reversed. The claimant is denied benefits for the week ending September 27, 2008 and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS**DATE OF MAILING - August 17, 2009***/s/*

John A. King, Esq.
Chairman

/s/

Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**(See Section 42, Chapter 151A, General Laws Enclosed)****LAST DAY TO FILE AN APPEAL IN COURT – September 16, 2009***AB/jv*